No. 80-295

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1980

National Association of Minority Contractors and Minority Contractors Association of Northern California, Inc.,

Petitioners

vs.

Associated General Contractors of California, et al.,

Respondents.

REPLY OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petition in this case raises three issues:

1. Is a state agency obliged to take appropriate action, including race conscious action, to remedy prior discrimination against racial minorities?

2. May a state, by statute, prohibit such race conscious remedies, even where premised upon findings of actual discrimination; and

3. May such race conscious remedies be authorized by a governmental agency other than Congress?

The response to the petition does not deny either the significance of those questions as a matter of constitutional jurisprudence, nor does it suggest that petitioners' view of those issues is

wrong. Rather, Respondents argue that such issues are somehow "not presented" by this case, a position they reach by characterizing this case as involving simply matters of state law statutory interpretation and the limits of delegated authority. With respect, that is an incorrect characterization not only of the issues presented by the petition, but the decision of the Ninth Circuit from which review is sought. However much respondents would like matters to be otherwise, this case raises important and difficult constitutional questions which, as the Ninth Circuit recognized, must be answered before the status of the low bid law can be determined. Respondents' efforts to defeat such review by mischaracterizing the facts and ignoring the opinion below do little service to

the evaluative process of this Court.

1. Respondents' principal argument is that the question of a constitutional duty to engage in affirmative action to remedy past discrimination never arises in this case because the San Francisco School Board was not authorized to take affirmative action by the California Legislature and, thus, is incompetent to do so. With all respect, that simply gets the matter backwards. If there is a constitutional duty to take remedial action to remedy identified discrimination, then the low bid law -- whether regarded as a failure to delegate that obligation or, as it is, an across-the-board prohibition of such remedial conduct -- directly and inexorably contravenes that constitutional duty. One cannot avoid addressing the existence vel non of that constitutional

duty (which is the issue framed by the petition) by suggesting that the only question is who must discharge it. In short, Respondents' argument simply misses the point.

2. Even if Respondents were somehow correct, that there is a relevant distinction between the acts of a local agency and those of a state Legislature, the fact remains that in this case we are presented with a situation in which the California Legislature has forbidden, by statute, the taking of affirmative action through Education Section 35160.[1/]

1/ Respondents' suggestion (e.g. Response, pp. 6-8) that enacting race-conscious remedies is beyond the jurisdiction of the San Francisco School District is, also, plainly wrong. The District is expressly

[FOOTNOTE CONTINUED ON FOLLOWING PAGE]

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charged by law with the letting of school construction contracts including the setting of terms therefor. See statutes and cases cited at Petition, p. 17 (r. 9). That authority expressly includes matters touching race discrimination in such projects. See 42 Cal. Op. Att'y Gen. 167 (1963); cf. Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.W.2d 907 (1969) cert. den. 396 U.S. 1004 (1970). Thus, but for the "low bid law" by which the state purports to prohibit such race conscious action, there is no question but that, under California law, the District would have had the power to adopt the program here in question.

Respondents' attempt to avoid that fact by instead characterizing the situation as one involving merely a "failure to delegate" by the State Legislature is simply erroneous. For Section 35160, interpreted even as Respondents would have it, is clearly a prohibition by the State of all race conscious remedies and is expressly intended to prohibit entities like the San Francisco School District from employing affirmative action to remedy past discrimination. Were this a case in which jurisdiction to employ race conscious remedies in the awarding of school construction contracts had been reserved by the State to some other agency (state or local) there might be some pertinence to Respondents' position. However, given the facts as they are, this case squarely presents the issue (discussed

at pages 12-15 of the petition) whether, under this Court's prior decisions, such as North Carolina Board of Education v. Swann, 402 U.S. 43 (1971)[2/] it is unconstitutional

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2/ For the reasons given in text, Respondents' attempt to distinguish Swann is simply beside the point. Here, as in Swann, "the issue [is] whether a state could enact a statute which would actively hinder vindication of federal constitutional rights" (Response to Petition at 7; emphasis in original). The observation that, in this case, the low bid law is intended to protect the public fisc" is, with all respect, a non sequitur to the proposition for which it is purportedly offered, as well as irrelevant to the constitutional analysis in our petition.

for a state to attempt to prohibit race conscious remedies for prior discrimination.

3. Respondent's reply to the suggestion that this petition should be granted to consider whether entities other than Congress have authority to adopt race conscious remedies for past discrimination is also beside the point. Their Response goes on at length (see pages 9-12) suggesting that the question of the "identity" of the agency taking such action is critical to its validity. Yet that is precisely our point and the very issue upon which certiorari should be granted. That issue was expressly left open by Justice Powell in Fullilove v. Klutznick, _____ U.S. _____ (1980). See Petition at 20-21 and n. 14. Moreover, whether this question is raised in this case

as well as in Minnick and Young, or only here, the importance of the issue remains as does the fact that it was left open in Fullilove and should be addressed by this Court.[3/]

Dated: November 20, 1980

Respectfully,

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3/ Respondents' suggestion, at pages 15-16 of the Response, that this case only involves questions of interpreting state law is simply unfathomable. While it is true that the constitutional issues raised by the petition and decided by the Ninth Circuit arise because of the interpretation placed on the low bid law in the courts below, that fact in no way avoids the presence of those issues, nor does it diminish their importance.